

COMMENTS

BACKLASH BLUNDERS: *OBERGEFELL* AND THE EFFICACY OF LITIGATION TO ACHIEVE SOCIAL CHANGE

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INTRODUCTION

On June 26, 2015, exactly two years after it invalidated key portions of the Defense of Marriage Act (“DOMA”) in *United States v. Windsor*, the Supreme Court issued its historic 5-4 ruling in *Obergefell v. Hodges*, holding that same-sex couples could no longer be barred from exercising the fundamental right to marriage.¹ For marriage-equality supporters, this judicial victory represented “the culmination of decades of litigation and activism.”² The gathering outside of the Supreme Court at the time of the ruling exuded an attitude of jubilation that spread throughout the country, as same-sex couples gathered in various cities to publicly celebrate the decision and, in many cases, to exercise their newly protected right to marry.³ Supporters of the Supreme Court’s holding also took to social media, as twenty-six

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¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015); *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

² Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html?_r=0.

³ *Id.* (collecting photos of “supporters of same-sex marriage gathered outside the Supreme Court”); Robert Barnes, *Supreme Court Rules Gay Couples Nationwide Have a Right to Marry*, WASH. POST (June 26, 2015), https://www.washingtonpost.com/politics/gay-marriage-and-other-major-rulings-at-the-supreme-court/2015/06/25/ef75a120-1b6d-11e5-bd7f-4611a60dd8e5_story.html (“A sea of cheering, rainbow flag-waving people filled the sidewalk in front of the Supreme Court to celebrate the decision.”); *Supreme Court Rules on Gay Marriage—Highlights*, N.Y. TIMES (June 26, 2015), <http://www.nytimes.com/live/supreme-court-rulings/?hp&action=click&pgtype=Homepage&module=a-lede-package-region®ion=top-news&WT.nav=top-news> (reporting on reactions to the decision around the country).

million Facebook users applied the now famous rainbow filter to their profile pictures, while over six million tweets, including a widely circulated one from President Barack Obama, used the hashtag “#lovewins” to show support for the decision.⁴

The tenor of public discourse regarding the ruling was not entirely celebratory, however. Some who opposed the outcome feared for their religious freedoms, and a few states even delayed the issuance of marriage licenses to same-sex couples.⁵ Several commentators on both sides of the aisle also gave less than optimistic forecasts for the decision’s impact, warning of the impending social and political backlash that was sure to follow.⁶ Explanations for this imminent backlash differed: while some openly drew comparisons to the negative public reactions that followed past important divisive cases, such as *Roe v. Wade* and *Brown v. Board of Education*,⁷ others more simply attributed the approaching wave of backlash to frustration over the Court’s lack of democratic legitimacy compared to the other branch-

4 Heather Kelly, *Facebook Rainbow Profiles Used by 26 Million*, CNN: MONEY (June 30, 2015), <http://money.cnn.com/2015/06/29/technology/facebook-rainbow-profile/> (“Rainbows spread quickly all over Facebook this weekend to celebrate the Supreme Court decision that legalized same-sex marriage.”); Kerry Flynn, *How #LoveWins on Twitter Became the Most Viral Hashtag of the Same-Sex Marriage Ruling*, INT’L BUS. TIMES (June 26, 2015), <http://www.ibtimes.com/how-lovewins-twitter-became-most-viral-hashtag-same-sex-marriage-ruling-1986279> (describing the meteoric rise in popularity of the “#loveWins” hashtag after President Obama used it on Twitter).

5 Elliot C. McLaughlin, *Despite Same-Sex Marriage Ruling, Spasms of Resistance Persist*, CNN (June 30, 2015), <http://www.cnn.com/2015/06/30/us/same-sex-marriage-supreme-court-ruling-holdouts/> (quoting governmental officials who opposed the decision and describing how state governments in Alabama and Louisiana initially delayed enforcement of the Court’s ruling).

6 See, e.g., John Culhane, *The Gay Marriage Fight Isn’t Over*, POLITICO (June 26, 2015), <http://www.politico.com/magazine/story/2015/06/gay-marriage-legal-backlash-119468> (“[This] decision will supply a hefty dose of oxygen to efforts already underway in red state legislatures to continue to deny marriage rights to gay couples.”); Scott Wyant, *Let the Backlash Begin*, DAILY KOS (July 5, 2015), <http://www.dailykos.com/story/2015/7/5/1399416/-Let-the-Backlash-Begin> (outlining the Arkansas government’s resistance to the ruling, including statements from members of the state legislature, and opining that this represents the beginning of a long period of backlash).

7 See, e.g., Culhane, *supra* note 6 (“In some ways, this new chapter of the gay marriage fight will likely mirror abortion rights in the wake of *Roe v. Wade*—a right technically legal but frustratingly difficult to exercise in many corners of the country.”); Michael C. Dorf, *Will the Supreme Court’s Same-Sex Marriage Ruling Face “Massive Resistance”?*, JUSTIA VERDICT (June 30, 2015), <https://verdict.justia.com/2015/06/30/will-the-supreme-courts-same-sex-marriage-ruling-face-massive-resistance> (“Segregationists in the South (joined by some in the North) responded to *Brown* with a campaign of ‘massive resistance’. . . . [I]t is easy to imagine a campaign of, if not massive resistance, then at least substantial resistance to the Court’s [same-sex marriage] ruling.”).

es.⁸ Notables among this latter group included the dissenting Justices, who uniformly decried the majority's decision as a usurpation of the legislature's role in democratic governance.⁹ Chief Justice John G. Roberts, Jr., stressed this theme early in his dissent, stating: "Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept."¹⁰

Despite gloomy forecasts and initial rumblings of red state resistance, any hints of outright defiance quickly fizzled. In multiple states where the decision struck down existing marriage laws, Republican officeholders nevertheless issued public statements of intent to comply with the Supreme Court's ruling, despite expressing personal disagreement with the Court's holding.¹¹ Contrary to earlier statements threatening to postpone the issuance of marriage licenses, by June 29, 2015, a mere three days after the ruling, every state was issuing marriage licenses in compliance with the Supreme Court's decision.¹²

With the notable exception of one defiant county clerk capturing media attention,¹³ the country quickly adjusted to a new mode of business as usual—one where states willingly granted marriage licenses to the couples who sought them, regardless of sex. All but the decision's most persistent detractors fell out of the spotlight relatively quickly, and public opinion in favor of same-sex marriage remained

8 See David Post, *A Few Words on Obergefell and the Countermajoritarian Tendency*, WASH. POST: VOLOKH CONSPIRACY (June 29, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/29/a-few-words-on-obergefell-and-the-countermajoritarian-tendency/> (arguing that the *Obergefell* decision "will come back to bite us" because it effectively excludes opponents of gay marriage from the political process and delegitimizes their world view).

9 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611–26, 2626–31, 2631–40, 2640–43 (2015) (Roberts, C.J. & Scalia, Thomas, & Alito, JJ., dissenting separately).

10 *Id.* at 2612 (Roberts, C.J., dissenting).

11 McLaughlin, *supra* note 5 ("Most states where same-sex marriage was outlawed before Friday . . . saw their governors or attorneys general promise to abide by the ruling, though many made it clear they didn't care for it.").

12 Jacob Koffler, *The Last Holdout Has Now Issued Gay Marriage Licenses*, TIME (June 29, 2015), <http://time.com/3940330/gay-marriage-louisiana/> ("The last state holding out on issuing marriage licenses to same-sex couples after Friday's historic Supreme Court ruling has relented.").

13 See Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail Over Deal on Same-Sex Marriage*, N.Y. TIMES (Sept. 3, 2015), http://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html?_r=0 (reporting on Kim Davis, a county clerk in Kentucky who was jailed after "defying a federal court order to issue licenses to gay couples").

stable.¹⁴ This seemingly smooth transition raises the question: where is the backlash? If this decision is comparable to *Roe* and *Brown*, why aren't protestors gathered outside of the county clerks' offices where marriage licenses are issued, and where is the "Traditional Marriage Manifesto?"¹⁵

The simple answer is that the *Obergefell* decision has not caused and will not incite a major backlash. This Comment will explore several of the reasons why the predicted backlash will never come to fruition. Part I will briefly recount the history of litigation leading up to *Obergefell*, describing how the unique road that led to the decision had the effect of reducing future resistance to it. Part II will discuss some of the most prominent backlash frameworks and how backlash scholars have applied them to the struggle for same-sex marriage. Part III will use strands of the backlash literature to argue that *Obergefell* is not a cause for alarm among those anxiously anticipating massive resistance. Finally, Part IV will use *Obergefell* to challenge the conventional wisdom that courts are extremely limited in their capacity to serve as an effective vehicle for significant social change.

Though this paper aims toward inspiring a critical reexamination of some of the backlash literature, it also acknowledges the role that awareness of the phenomenon of backlash has played, motivating institutional learning and adaptation on the part of both litigators and courts that made the advances heralded by *Obergefell* possible. I hope to show that, because of the Supreme Court's institutional learning and the unique political accountability structure surrounding the judicial branch as compared to the other branches, the decision to pursue social change in the Court is, at the very least, no less defensible than attempting to do so through the legislature. In certain situa-

14 David Boaz, *Marriage's Lonely Warrior*, U.S. NEWS & WORLD REP. (Sept. 11, 2015), <http://www.usnews.com/news/the-report/articles/2015/09/11/kim-davis-is-just-a-lonely-gay-marriage-warrior> ("Kim Davis is not a symbol of massive resistance. Mostly she's just a lonely warrior."); Justin McCarthy, *U.S. Support for Gay Marriage Stable After High Court Ruling*, GALLUP (July 17, 2015), http://www.gallup.com/poll/184217/support-gay-marriage-stable-high-court-ruling.aspx?g_source=SAME_SEX_RELATIONS&g_medium=topic&g_campaign=tiles (explaining that the Court's ruling on same-sex marriage "has not affected the way Americans feel about the issue").

15 *But see Statement Calling for Constitutional Resistance to Obergefell v. Hodges*, AMERICAN PRINCIPLES PROJECT (Oct. 8, 2015), <https://americanprinciplesproject.org/founding-principles/statement-calling-for-constitutional-resistance-to-obergefell-v-hodges%E2%80%AF/> (resisting the Court's *Obergefell* opinion and calling on federal and state officials "to refuse to accept *Obergefell* as binding precedent"). Unlike the Southern Manifesto, however, this seems to have generated relatively little mainstream attention or support.

tions, the Court will be a more efficient vehicle for such change. *Obergefell* may very well provide an example of one such scenario.

I. THE ROAD TO *OBERGEFELL*

While the initial rumblings of the litigation battle over same-sex marriage began in the 1970s, resulting in a string of unsuccessful lawsuits,¹⁶ the movement started to gain real traction in 1993 with the first same-sex marriage victory in a court of last resort anywhere in the United States.¹⁷ In the case of *Baehr v. Lewin*, the Hawaii Supreme Court declared that withholding the right of marriage from same-sex couples constituted sex discrimination and thus presumptively violated the Hawaii Constitution.¹⁸ This historic ruling converted the idea of same-sex marriage from a distant ambition to a reality—surprising and, ultimately, mobilizing those on both sides of the controversy.¹⁹ While the mobilization effect of *Baehr* among those opposed to same-sex marriage was obvious, as they rapidly (and successfully) moved to quell the ruling via legislation in Hawaii and launch legislative campaigns in a number of other states,²⁰ the mobilizing effects were at first more diffuse for marriage-equality advocates. Though solid data are unavailable, some assert that, by rendering same-sex marriage realistic, *Baehr* had a unifying effect on the agenda of the gay rights movement, transforming this now attainable end into a uniform goal.²¹ Others argue that any agenda-setting effect largely arose as the

16 See, e.g., *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1102, 1111 (1982) (affirming refusal to issue marriage license to same-sex couple applicants); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) *appeal dismissed*, 409 U.S. 801, 810 (1972); *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984) (denying that common law marriage applied to same-sex unions); *Singer v. Hara*, 552 P.2d 1187 (Wash. Ct. App. 1974) (affirming refusal to grant marriage license to same-sex applicants). Daniel Pinello notes that one major reason these cases were unsuccessful was because they were brought by “[l]one couples, unsupported by organized lesbian and gay interests, [who] made ad hoc assertions of novel social and constitutional positions, often without the benefit of legal arguments orchestrated by seasoned advocates.” DANIEL R. PINELLO, *AMERICA’S STRUGGLE FOR SAME-SEX MARRIAGE* 23 (2006).

17 PINELLO, *supra* note 16, at 25.

18 *Baehr v. Lewin*, 852 P.2d 44, 54, 67–68 (Haw. 1993) (holding that a state marriage law, insofar as it was used to ban same-sex marriage, violated the state constitution’s Equal Protection Clause, and was thus presumptively unconstitutional and subject to strict scrutiny upon remand).

19 PINELLO, *supra* note 16, at 25–30.

20 MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* 63–66, 68 (2013).

21 William N. Eskridge, Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275, 311–12 (2013).

result of the same-sex marriage movement necessarily taking a defensive posture in response to the massive “anticipatory countermobilization” that the *Baehr* decision incited across various states.²²

Either way, opponents of same-sex marriage struck first, and they struck hard. A state constitutional amendment overturned the Hawaii ruling before any same-sex marriages could occur.²³ Likewise, just three years after *Baehr*, in 1996, Congress passed DOMA, defining marriage as being between “one man and one woman,” removing the possibility of federal benefits for same-sex couples, and authorizing states to withhold recognition of same-sex marriages executed in other states.²⁴ Over the course of the subsequent ten years, legislative campaigns across the United States would result in more than forty different states banning same-sex marriage via legislation or state constitutional amendment.²⁵

In 1999, the next major state ruling in favor of same-sex marriage emerged in Vermont. *Baker v. State* determined that limiting marriage to opposite-sex couples violated the state constitution’s equal protection provision.²⁶ The Vermont Supreme Court delegated the creation of a remedy to the legislature, which found that civil unions would satisfy the state’s constitutional requirements, passing a bill that brought them into effect the following year.²⁷ Though one prominent backlash scholar has characterized *Baker* as an ideal political compromise, embodying “the values of tolerance and mutual respect” in an otherwise gridlocked political environment,²⁸ neither side seemed satisfied with the outcome. Opponents of same-sex marriage repeatedly attempted to repeal the civil union legislation, while many marriage-equality advocates would soon see the civil union label as a

22 Michael C. Dorf & Sidney Tarrow, *Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena*, 39 L. & SOC. INQUIRY 449, 455, 461 (2014).

23 PINELLO, *supra* note 16, at 27. It is worth noting, however, that “in the wake of *Baehr*, the state legislature in 1997 created a ‘reciprocal benefits’ law that granted limited relationship rights to same-sex couples.” *Id.*

24 1 U.S.C. § 7 (1996) (defining “marriage” as “a legal union between one man and one woman”), *invalidated by* United States v. Windsor, 133 S. Ct. 2675, 2695 (2013); 28 U.S.C. § 1738C (1996) (allowing states to deny giving effect to the same-sex marriages of other states in their own jurisdictions). Collectively, these statutes comprise the Defense of Marriage Act. *See also* PINELLO, *supra* note 16, at 29.

25 PINELLO, *supra* note 16, at 29.

26 744 A.2d 864 (Vt. 1999).

27 PINELLO, *supra* note 16, at 29–30.

28 William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853, 881 (2001).

form of “second-class citizenship,” despite the admitted progress that it embodied.²⁹

In 2003, the United States Supreme Court began to seriously weigh in on the debate with its landmark decision in *Lawrence v. Texas*. In a previous case, *Romer v. Evans*, the Court had condemned the “animosity” underlying a Colorado statute that foreclosed the possibility of statutory protections based on sexual orientation.³⁰ Echoing *Romer*, the *Lawrence* opinion held that moral disapproval was insufficient to justify the criminalization of homosexual activity, overturning its precedent from *Bowers v. Hardwick*.³¹ Though Justice Kennedy, who wrote the opinion, made it clear that the ruling had no effect on same-sex marriage rights,³² commentators noted that “he left little doubt where his (and the Court’s) sympathies lay.”³³ Justice Scalia also expressed incredulity regarding the self-imposed limitations on the holding, noting in his dissent that the reasoning of the majority left state same-sex marriage bans “on pretty shaky grounds.”³⁴

Despite Justice Kennedy’s disclaimer and the limited nature of the *Lawrence* holding, the decision had a serious impact on the movement for equal marriage rights. For the first time, the same-sex marriage debate received sustained mainstream media attention.³⁵ This spike in coverage of same-sex marriage was accompanied by a short-term backlash evidenced in public opinion data, as approval of same-sex marriage fell from 38% to 30% of the United States population in the months following the ruling.³⁶

29 KLARMAN, *supra* note 20, at 77–79, 83; PINELLO, *supra* note 16, at 188.

30 *Romer v. Evans*, 517 U.S. 620, 624, 634 (1996).

31 *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186, 195–96 (1986), which held that due process did not protect any right of individuals to engage in sodomy, regardless of whether it took place in the privacy of one’s own home).

32 *Id.* at 578.

33 Dorf & Tarrow, *supra* note 22, at 455.

34 *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting) (opining that the reasoning in Justice O’Connor’s concurrence “leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples”); *see also id.* at 605 (Scalia, J., dissenting) (“This case ‘does not involve’ the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.”).

35 Nathaniel Persily et al., *Gay Marriage, Public Opinion and the Courts* 18, 20–23, (Penn Law Faculty Scholarship, Paper No. 91, 2006), http://scholarship.law.upenn.edu/faculty_scholarship/91 (using polling data on approval of gay marriage collected by the Pew Research Center and number of mentions of gay marriage in news media to show a negative correlation between the two following the *Lawrence* decision).

36 *Id.* at 21. The authors also noted that such “short-term” backlash is highly unusual, theorizing that it arose here largely due to the combination of increased media coverage, raising the salience of a relatively new issue, and the statements made against same-sex mar-

This decline continued in the aftermath of the next significant same-sex marriage state court decision, which occurred later that same year.³⁷ In *Goodridge v. Department of Public Health*, the Massachusetts Supreme Judicial Court declared that its state constitution protected same-sex couples' right to marry.³⁸ Opponents of the ruling failed to gather the necessary support for any constitutional amendment overturning the case at the subsequent constitutional conventions.³⁹ As a result, unlike its predecessor, *Baehr*, the Massachusetts holding led to the first actual same-sex marriages in the country.⁴⁰ The increased media attention to same-sex marriage continued into 2004, as San Francisco Mayor Gavin Newsom unilaterally distributed over 4000 marriage licenses to same-sex couples, despite California's 2000 marriage statute that defined marriage as "between a man and a woman."⁴¹ In the aftermath of the Newsom affair, the California Supreme Court invited a constitutional challenge to the 2000 statute. Thus, although San Francisco's licenses were later invalidated, Newsom's actions laid the groundwork for the 2006 case that would legalize same-sex marriage in California.⁴²

These events on the state level brought same-sex marriage to the forefront of national politics. In February of 2004, President George W. Bush endorsed a constitutional amendment to protect traditional marriage.⁴³ Though the amendment failed to gain traction,⁴⁴ one

riage by political elites, who wouldn't begin to come out in favor of marriage equality until 2006. *Id.* at 9, 25, 43.

³⁷ *Id.* at 21.

³⁸ 798 N.E.2d 941, 948 (Mass. 2003).

³⁹ PINELLO, *supra* note 16, at 35, 56, 71. The opposition's failure to pass an amendment was not for lack of trying. In the 2004 Massachusetts Constitutional Convention, a DOMA amendment only failed to pass by a narrow margin before the majority, after days of debate, settled on an amendment allowing civil unions. This amendment required approval the following year as well in order to be introduced to Massachusetts voters on the ballot; however, after the 2004 elections yielded losses for same-sex marriage opponents and corresponding gains for advocates, the civil union amendment failed by a landslide in the 2005 Constitutional Convention. *Id.*

⁴⁰ *Id.* at 68–72.

⁴¹ *Id.* at 74 (discussing the distribution of marriage licenses during the period referred to in the Bay Area as the "Winter of Love"); see also Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1172 (2009) (describing how Newsom acted "unilaterally" in issuing marriage licenses to same-sex couples during that time); Cal. Fam. Code § 308.5 (West 2000) (recognizing "only marriage between a man and a woman").

⁴² Schacter, *supra* note 41, at 1172 ("The California Supreme Court ultimately invalidated the Newsom-era marriages, but it left the door open for the constitutional challenge to the California ban on same-sex marriage that was later filed.") (citing *Lockyer v. City of San Francisco*, 95 P.3d 459, 464, 494–95 (Cal. 2004)).

⁴³ PINELLO, *supra* note 16, at 20 (explaining the proposed "Federal Marriage Amendment").

backlash scholar also credits President Bush's electoral victory in the 2004 presidential race in large part to his stance against same-sex marriage in the aftermath of *Goodridge*.⁴⁵ Other commentators have pointed out, however, that many issues—for instance, national security and terrorism—took a more central role in the election, and that any gains President Bush experienced because of his stance on marriage were modest at best.⁴⁶

Goodridge and the surrounding events did have their own fairly distinct national backlash, however. While there had only been three states with constitutional amendments banning same-sex marriage prior to 2004, over the subsequent three years, twenty-six additional states would pass constitutional amendments restricting marriage to opposite sex couples only.⁴⁷ Some of these amendments were also worded strongly enough to block future civil union legislation.⁴⁸

Despite these effects, once the same-sex marriage debate again found itself on the media backburner in 2006, favorable public opinion recovered to its pre-*Lawrence* point and resumed its steady climb.⁴⁹ Moreover, public opinion toward civil unions improved dramatically over this period, with a gain of almost ten percentage points in favor of civil unions (and a corresponding decrease in those opposed) from 2004 to 2006.⁵⁰ This rise in favorable opinion corresponded to an increase in legislation allowing civil unions, as thirteen states and the District of Columbia had passed civil union or domestic partnership laws by 2009.⁵¹

Civil union laws did not prevent several states from eventually allowing full same-sex marriage rights in the coming years. Significant litigation victories in Connecticut and California legalized same-sex

44 *Id.* (“The Federal Marriage Amendment failed by substantial margins in both houses of Congress in 2004.”).

45 Michael Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 467 (2005).

46 *See* PINELLO, *supra* note 16, at 179–80 (examining survey data concerning the impact of President George Bush's stance against same-sex marriage on voters and finding that it had “relatively modest” effects).

47 Schacter, *supra* note 41, at 1188–89.

48 *Id.*

49 Persily et al., *supra* note 35, at 21–23.

50 *Id.* at 40–41 (discussing the effects of different survey formats on public opinion regarding civil unions, concluding that civil unions became more popular during this period regardless of question wording, and explaining this increase by reference to political elites' expression of approval for civil unions as a political compromise); *see also* PINELLO, *supra* note 16, at 182 (“[F]ull civil unions with all the rights and responsibilities of marriage instantly became the political fallback position after the [*Goodridge*] ruling.”).

51 *See* Schacter, *supra* note 41, at 1189–90 (noting that of the thirteen states with civil union or domestic partnership laws, only two “had acted under judicial compulsion”).

marriage within those states in 2008,⁵² though the California case was overturned shortly thereafter when the state passed Proposition 8, restricting marriage to one man and one woman by popular vote.⁵³ In 2009, an Iowa Supreme Court decision, *Varnum v. Brien*, legalized same-sex marriage, and several other states began guaranteeing equal marriage rights via statutes,⁵⁴ as public opinion favoring marriage equality continued to climb.⁵⁵ Indeed, by 2011, Maine, Vermont, New Hampshire, New York, and the District of Columbia had passed legislation conferring full marriage rights upon same-sex couples.⁵⁶

Localized backlash was also a consistent theme throughout this period. In addition to Proposition 8 in California, a ballot initiative overturned the Maine marriage-equality legislation, and Iowa voters removed the judges from office who had voted in favor of same-sex marriage in *Varnum*.⁵⁷ Nevertheless, national public opinion continued to march toward wider endorsement of same-sex marriage, as a 2010 poll became the first to show a majority of the American public in favor of same-sex marriage rights.⁵⁸ A steady drumbeat of cases promoting marriage equality also began to build in 2010, as federal courts started issuing rulings weighing against DOMA's constitutionality,⁵⁹ and a district court in California invalidated Proposition 8 on

52 See *In re Marriage Cases*, 183 P.3d 384, 452–53 (Cal. 2008) (legalizing same-sex marriage in California until an amendment to the state constitution was passed), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5; *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008) (legalizing same-sex marriage in Connecticut).

53 CAL. CONST. art. I, § 7.5; see also Schacter, *supra* note 41, at 1190–91 (characterizing Proposition 8 preparation as “pre-backlash” because it commenced before the *In re Marriage Cases* decision even came out, and describing how “Proposition 8 went on to pass with approximately 52% of the vote”) (internal citations omitted).

54 763 N.W.2d 862 (Iowa 2009); see Dorf & Tarrow, *Bedfellows*, *supra* note 22, at 456 (in 2009, “same same-sex marriage was made legal by legislation” in Maine and Vermont).

55 Schacter, *supra* note 41, at 1194 (“Moreover, public support for same-sex marriage appeared to increase noticeably in 2009 . . . [S]everal polls registered new levels of support.”).

56 Dorf & Tarrow, *Bedfellows*, *supra* note 22, at 456.

57 *Id.*

58 *Opinion Research Poll* at 3, CNN, (Aug. 11, 2010), <http://i2.cdn.turner.com/cnn/2010/images/08/11/re111a1a.pdf>; see also FREEDOM TO MARRY, *CNN For the First Time, Poll Finds Majority Support for Freedom to Marry Nationwide* (Aug. 2010), <http://www.freedomtomarry.org/blog/entry/for-the-first-time-poll-finds-majority-support-for-the-freedom-to-marry-nat> (noting that the 2010 CNN poll was “the first national poll to show that a majority of Americans support the freedom to marry”).

59 See, e.g., *Massachusetts v. U.S. Dep't of Health*, 682 F.3d 1, 6 (1st Cir. 2012) (noting DOMA inhibits same-sex married couples from enjoying the full benefits of marriage, such as being able to file joint federal tax returns); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 974 (N.D. Cal. 2012) *appeal dismissed*, 724 F.3d 1048, 1049–50 (9th Cir. 2013) (holding DOMA, as applied to the plaintiff, was unconstitutional); *Dragovich*

constitutional grounds—a ruling that would later be upheld by the United States Supreme Court.⁶⁰

President Obama also showed the first signs of changing the executive stance on the same-sex marriage issue during this period, as Attorney General Eric Holder sent a letter to Speaker of the House John Boehner in early 2011 announcing that the administration would no longer defend the constitutionality of DOMA.⁶¹ The administration's new position fueled the increasing number of federal cases taking issue with DOMA's constitutionality.⁶² President Obama's views on marriage equality completed their "evolution" in 2012, as the President came out in favor of same-sex marriage before winning re-election.⁶³

The following year yielded unprecedented gains for marriage-equality advocates. In 2013, six more states legalized same-sex marriage.⁶⁴ Additionally, the Supreme Court again issued rulings that weighed in on the same-sex marriage debate, although the majority continued to refuse to directly answer whether the Constitution safeguarded any right to same-sex marriage.⁶⁵ Issuing twin opinions, the Supreme Court refused to overturn a California district court's invalidation of Proposition 8 in *Hollingsworth v. Perry*, and declared key

v. U.S. Dep't of the Treasury, 764 F. Supp. 2d 1178, 1190 (N.D. Cal. 2011) (denying a motion to dismiss the plaintiff's lawsuit challenging DOMA).

⁶⁰ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991 (N.D. Cal. 2010) (invalidating Proposition 8 for "unconstitutionally burden[ing] the exercise of the fundamental right to marry and creat[ing] an irrational classification on the basis of sexual orientation"), *aff'd*, 591 F.3d 1147 (9th Cir. 2010), *vacated*, *Hollingsworth v. Perry*, 133 S. Ct. 2652(2013); *Hollingsworth*, 133 S. Ct. at 2668 (vacating the Ninth Circuit's affirmance due to lack of standing, but leaving the district court's judgment in effect).

⁶¹ Letter from Eric H. Holder, Jr., Attorney Gen., to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011) <http://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act>.

⁶² *See supra* note 59 (listing cases challenging DOMA's constitutionality).

⁶³ *See* Jackie Calmes & Peter Baker, *Obama Says Same-Sex Marriage Should Be Legal*, N.Y. TIMES (May 9, 2012), http://www.nytimes.com/2012/05/10/us/politics/obama-says-same-sex-marriage-should-be-legal.html?_r=0 (describing the evolution of President Obama's views, culminating in his endorsement of same-sex marriage rights).

⁶⁴ *See* Dorf & Tarrow, *Bedfellows*, *supra* note 22, at 456 ("On January 1, [2013,] same-sex marriage became legal in Maryland, as a result of changes approved in 2012. Rhode Island, Delaware, Minnesota, Hawaii, and Illinois all followed with marriage equality statutes of their own, although the Illinois law does not go into effect until the middle of 2014.").

⁶⁵ *See, e.g.,* *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013) (vacating the Ninth Circuit's affirmance of a district court's judgment invalidating Proposition 8 for lack of standing); *United States v. Windsor*, 133 S. Ct. 2675, 2683, 2695 (2013) (invalidating the portion of DOMA that defines marriage as between one man and one woman on Fifth Amendment Due Process Clause grounds).

portions of the federal Defense of Marriage Act unconstitutional in *United States v. Windsor*.⁶⁶

Though critics such as Justice Scalia attacked Justice Kennedy's majority opinion in *Windsor* for its lack of clarity,⁶⁷ others have suggested that the opinion's ambiguity was intentional.⁶⁸ The Supreme Court's progressive but gradual approach seemed to provide a clear signal for lower courts to follow while allowing the Court to bide its time, await a potential circuit split and let the positive trend in favorable public opinion toward same-sex marriage continue, enabling any future marriage decision to better avoid backlash.⁶⁹

If there was an intentional signal, the lower courts seemed to have no trouble catching on, as the trickle of decisions against DOMA's same-sex marriage ban grew into a cascade.⁷⁰ In the two years between *Windsor* and *Obergefell*, there were four different circuit decisions and *over forty* district court decisions that were favorable to same-sex marriage.⁷¹

To put the movement's progress in perspective, before *Windsor* a total of nine states and the District of Columbia allowed same-sex marriages.⁷² By the time the Supreme Court decided *Obergefell*, a total of thirty-seven states already permitted same-sex marriages.⁷³ Of the twenty-eight additional states that found marriage equality between the Supreme Court cases, five of them recognized same-sex marriage through legislation (Illinois, Hawaii, Delaware, Minnesota, and Rhode Island), while the other twenty-three granted same-sex marriage rights through judicial decisions.⁷⁴ One scholar described this

66 *Hollingsworth*, 133 S. Ct. at 2668; *Windsor*, 133 S. Ct. at 2683, 2695.

67 *See Windsor*, 133 S. Ct. at 2705–07 (Scalia, J., dissenting) (describing the majority's justifications behind its ruling as “rootless and shifting”).

68 Tom Watts, *From Windsor to Obergefell: The Struggle for Marriage Equality Continued*, 9 HARV. L. & POL'Y REV. S52, S56–58 (2015).

69 *See id.* at S58 (“If the outcome in *Perry* was an attempt by the Supreme Court to avoid backlash . . . then *Windsor* was the corollary . . . *Windsor* may have been written the way that it was in order to create a circuit split on the state same-sex marriage bans, thus returning to the court the very issue that it deferred in *Perry*.”).

70 *See id.* at S64–65 (describing the “flood of favorable district court decisions” that occurred post-*Windsor*).

71 *Id.* at S58–71. In contrast, there were only four federal cases that disfavored same-sex marriage equality, including the Sixth Circuit case that created the circuit split and led the Supreme Court to take *Obergefell* under advisement. *Id.*

72 *See* L.A. Times Staff, *Timeline: Gay Marriage Chronology*, L.A. TIMES (June 26, 2015) (tabulating legalization of same-sex marriage across the states, along with causes of legalization between legislation and judicial order).

73 Julia Zorthian, *These Are the States Where SCOTUS Just Legalized Same-Sex Marriage*, TIME (June 26, 2015), <http://time.com/3937662/gay-marriage-supreme-court-states-legal/>.

74 *See, e.g.*, L.A. Times Staff, *supra* note 72 (providing an interactive map tracking legislation and court decisions legalizing same-sex marriage across states leading up to *Obergefell*).

period as “one of the most remarkable flurries of constitutional litigation in American history.”⁷⁵ During this period, favorable public opinion toward marriage equality also continued its persistent climb, moving from 54% to 60% of United States citizens approving of same-sex marriage leading up to *Obergefell*, without any significant decline in the immediate aftermath of the decision.⁷⁶ The Supreme Court’s strategy of moving alongside public opinion, neither falling too far behind nor stretching too far ahead of it, seems to reflect institutional learning from previous landmark cases and, perhaps, the scholarship surrounding backlash, which the next Part explores.

II. BACKLASH FRAMEWORKS

Backlash in the judicial context can be defined broadly as the mobilization of political opposition against an adverse court ruling, the effect of which is to undermine either the ruling’s implementation or subsequent policy goals of the victor.⁷⁷ Examples of judicial backlash include the passage of opposing legislation, the electoral removal of politicians who endorsed the ruling, or even outright resistance to the ruling’s execution.⁷⁸ Though much work has examined backlash as a broad political phenomenon, this Part will focus on the judicial context, exploring the frameworks of three prominent scholars who have sought to explain and predict backlash specifically in response to court decisions. Importantly, each of these scholars has weighed in on the efficacy of the litigation strategy that marriage equality advocates have pursued as well.⁷⁹

⁷⁵ Watts, *supra* note 68, at 578.

⁷⁶ McCarthy, *supra* note 14.

⁷⁷ See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 388–89 (2007) (reviewing the developing understanding of the term “backlash” and exploring how it has been applied to discussions of judicial decisions).

⁷⁸ See, e.g., Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1237 (2010) (defining the backlash thesis as “the proposition that litigation does more harm than good for social change movements by producing countermobilization that makes reform goals more difficult to achieve”). Some scholars have convincingly argued that examining this topic from the perspective of judges and advocates causes academics to miss key positive effects of backlash—namely, the popular constitutional dialogue that backlash inspires (and, to an extent, embodies). See Post & Siegel, *supra* note 77, at 373, 389–91. In addressing the more judiciary-focused backlash literature and arguing that litigants and judges perhaps should not be as fearful of backlash as the past scholarship would indicate, the present study necessarily adopts a similarly court-focused view. However, the idea of backlash as a useful tool to rouse popular constitutional dialogue is one to which I will return in Part IV.

⁷⁹ See also Eskridge, *supra* note 21, at 311–12 (arguing that same-sex marriage litigation has caused backlash, but concluding that the progress from litigation in this case has so far

The work of the first scholar, Gerald N. Rosenberg, proposes that courts, acting on their own, are a “hollow hope” for social movement progress due to several structural constraints.⁸⁰ These constraints, which delimit the judiciary’s efficacy as an agent of social change, include (1) the limited nature of constitutional rights, (2) the judicial branch’s lack of independence from the influence of the other branches, and (3) the judiciary’s inability to implement its own decisions.⁸¹ These limitations stymie the advancement of social movements that use litigation strategies by either guaranteeing loss or offsetting any judicial gains with the resulting countermobilization of opponents.⁸² Rosenberg thus argues that, in the absence of an accompanying political movement, litigation will be counterproductive to social movement goals.⁸³

Rosenberg released a critique of the same-sex marriage movement’s litigation strategy in 2008, applying his criteria to *Baehr*, *Baker*, and *Goodridge*.⁸⁴ Arguing that each decision more effectively mobilized opponents than advocates, he asserted that “the political insulation of the judiciary, the very attribute that allows the relatively disadvantaged to have their day in court, also limits the efficacy of judicial victories.”⁸⁵ Rosenberg ascribes the same-sex marriage backlash (and backlash in general) to both a popular perception of courts as an anti-democratic institution and their greater tendency, in the absence of direct political feedback, to flout public opinion in their rulings.⁸⁶ He concludes that the marriage-equality campaign would have been better off using its resources to pursue legislative change, or, if it insisted

outweighed the detriment). *See generally* GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 339–415 (2d ed. 2008); KLARMAN, *supra* note 20, at 63–68.

80 ROSENBERG, *supra* note 79, at 430.

81 *Id.* at 10–21. Rosenberg also discusses several conditions, at least one of which must be present for courts to overcome the implementation constraint for a given social cause. *Id.* at 30–35. However, they are inapplicable to the same-sex marriage debate, as the implementation constraint does not come into play. *Id.* at 350–51. They are therefore omitted from this discussion.

82 *See id.* at 83–84 (discussing how civil rights lawyers, despite their victory in *Brown*, were unable to overcome massive resistance to implementation of desegregation without the Court’s assistance from other branches).

83 *Id.* at 428–29.

84 *Id.* at 343–54.

85 *Id.* at 417. Rosenberg elaborates further on this point, explaining that judges are more likely to act in the absence of political support than other governmental actors, thus inspiring backlash, due to this lack of political accountability. *Id.* at 425–26.

86 *Id.* at 425–26.

on litigation, proceeding more gradually, targeting civil unions before attempting to attain full marriage rights.⁸⁷

Legal historian Michael Klarman, whose backlash scholarship could be described as the spiritual successor to Rosenberg's "hollow hope" thesis, had a much rosier assessment of the same-sex marriage movement's litigation strategy in his more recent evaluations.⁸⁸ In his earlier work, Klarman argued that court decisions "produce backlashes for three principal reasons: They raise the salience of an issue, they incite anger over 'outside interference' or 'judicial activism,' and they alter the order in which social change would otherwise have occurred."⁸⁹ Like Rosenberg's explanation of backlash, Klarman's framework rests on two pillars: his first and third reasons imply that judicial backlash arises because courts can more easily fall out of touch with public opinion than their more politically accountable governmental colleagues,⁹⁰ while his second reason seems to attribute backlash to a supposedly popular view of courts as external, non-democratic intermeddlers.⁹¹ Klarman concludes that the Supreme

87 *Id.* at 417–19.

88 *See* KLARMAN, *supra* note 20, at 218–19 (arguing that public opinion trends make the eventual legalization of same-sex marriage inevitable regardless of whether proponents choose a litigation or legislation strategy, though the latter would lead to less backlash along the way).

89 Klarman, *supra* note 45, at 473.

90 *See id.* at 474, 478–79 (noting, with regard to the salience point, that "Court rulings such as *Lawrence* and *Goodridge* forced people who previously had not paid much attention to gay-rights issues to notice what has been happening and to form an opinion on it," and in reference to the order of social change, that *Goodridge* inspired backlash because it mandated marriage equality at a time when American public opinion had only just warmed up to civil unions and remained opposed to same-sex marriage).

91 *See id.* at 475 ("[B]ecause [*Goodridge*] was a court decision, rather than a reform adopted by voters or popularly elected legislators, critics were able to deride it as the handiwork of arrogant 'activist judges' defying the will of the people."). Whether this characterization of courts as "anti-democratic" serves as a mere rhetorical argument used by political elites, or itself represents a source of backlash, is left unclear in Klarman's work. In his earlier assessment of same-sex marriage, Klarman seems to imply both, though scholars evaluating his work have disagreed on this point. *Compare* Post & Siegel, *supra* note 78, at 392 n.91 (dismissing the implication in Klarman's work that judicial activism is an inherent source of backlash because "Klarman makes no serious effort to argue that there would be less backlash if Congress, rather than courts, were to have ended school desegregation or abolished the crime of sodomy, and the common sense of the matter is surely to the contrary") with David Fontana & Donald Braman, *Judicial Backlash or Just Backlash? Evidence from a National Experiment*, 112 COLUM. L. REV. 731, 741–42, n.29 (2012) (contending that Klarman is making an argument about the popular perception of judicial competency by presenting the rhetorical arguments against "judicial activism" as being successful). In his more recent work, Klarman has stated, in reference to his assertion that judicial decisions can outpace public opinion, thereby causing backlash, that "[t]he point is not that court decisions generate greater backlash than identical legislative policy resolutions would have, but rather that courts may issue unpopular decisions that legisla-

Court “rarely, if ever” serves as “the vanguard of a social reform movement” because it is too constrained by the threat of backlash to significantly deviate from public opinion.⁹² It can, however, attain symbolic victories by “constitutionaliz[ing] consensus and suppress[ing] outliers.”⁹³

Klarman’s more recent assessments of the same-sex marriage litigation strategy and its capacity to overcome or bypass backlash have grown increasingly optimistic. In his 2013 book on the subject, Klarman described the legalization of same-sex marriage as inevitable and predicted that it would most likely occur through a Supreme Court ruling.⁹⁴ Notably, as one reviewer points out, though Klarman uses the same variables previously described to predict backlash, his tone and conclusion have changed, reflecting more positive appraisals of the efficacy of the marriage-equality movement’s litigation strategy.⁹⁵ While Klarman concluded in 2005 that same-sex marriage litigation had hurt more than it had helped the movement,⁹⁶ in 2013 he drew the opposite conclusion.⁹⁷ Nevertheless, Klarman cautioned that opposition to same-sex marriage remained strong and that how the marriage-equality movement proceeded would affect the level of resistance it encountered.⁹⁸

tures, confronting the same issue at the same time, would have avoided.” KLARMAN, *supra* note 20, at 167–68.

⁹² Klarman, *supra* note 45, at 445.

⁹³ MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 453–54 (2004) [hereinafter “KLARMAN, FROM JIM CROW TO CIVIL RIGHTS”]; see also KLARMAN, *supra* note 20, at 207 (“Once public opinion has shifted overwhelmingly in favor and many more states have enacted gay marriage, the Court will constitutionalize the emerging consensus and suppress resisting outliers. That is simply how constitutional law works in the United States.”); Klarman, *supra* note 45, at 450–51 (discussing various justices’ “strong sensitivity to public opinion”).

⁹⁴ KLARMAN, *supra* note 20, at 202–07.

⁹⁵ Jane S. Schacter, *Making Sense of the Marriage Debate*, 91 TEX. L. REV. 1185, 1193–94 (2013) (reviewing KLARMAN, *supra* note 20). Klarman acknowledges that his thinking on the subject changed and developed between his works. KLARMAN, *supra* note 20, at 223.

⁹⁶ Klarman, *supra* note 45, at 482. (“By outpacing public opinion on issues of social reform, such rulings [like *Goodridge* and *Lawrence*] mobilize opponents, undercut moderates, and retard the cause they purport to advance.”). It is important to note that *Lawrence* did not outpace public opinion because it legalized homosexual sodomy, but because it was popularly associated with same-sex marriage, which was at the time largely unsupported. *Id.* at 459; *Gay and Lesbian Rights*, GALLUP, <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx> (tracking polling results across time and finding that approximately 40% of respondents in 2003 supported same-sex marriage, while 60% opposed it).

⁹⁷ KLARMAN, *supra* note 20, at 218 (“On balance, litigation has probably advanced the cause of gay marriage more than it has retarded it.”).

⁹⁸ *Id.* at 219.

Most recently, in an interview after the *Obergefell* decision came out, Klarman expressed doubt that there would be any serious backlash to the ruling.⁹⁹ He argued that *Obergefell* will largely dodge backlash for four reasons: (1) it is congruent with public opinion toward marriage equality, (2) it does not directly impact the lives of opponents, (3) the national Republican party has grown less likely to endorse isolated resistance to same-sex marriage,¹⁰⁰ and (4) circumventing implementation will be difficult.¹⁰¹ This more recent backlash iteration wisely discards any notion that resistance to judicial rulings might arise from an inherent, popularly held view of courts as non-democratic institutions; rather, it substantially relies on any given decision's congruence with public opinion.¹⁰²

Finally, prominent backlash author William Eskridge takes perhaps the least critical outlook on the same-sex marriage litigation strategy.¹⁰³ His backlash framework distinguishes between (1) "normal politics," which are the lowest stakes and involve consequentialist assessments of proposed policies, (2) "identity politics," which implicate "small 'c' constitutional issues," or those that are especially relevant to our personal values, and (3) "the politics of disgust," which are the highest stakes and deal with issues that trigger highly negative, deeply rooted feelings like "disgust and contagion."¹⁰⁴

99 Rick Shenkman, *Why Liberals Shouldn't Worry About a Backlash to the Same-Sex Marriage Ruling: An Interview with Harvard's Michael Klarman*, HISTORY NEWS NETWORK (July 3, 2015), <http://historynewsnetwork.org/article/159870> (quoting Professor Klarman's argument that "*Obergefell* probably will not elicit anything like the political backlash ignited by other landmark Court rulings, such as *Brown*, *Furman*, and *Roe*"). Klarman also made a similar prediction in an article after the release of his book but before the decision. See Michael Klarman, *A Gay Marriage Backlash? Not Likely*, L.A. TIMES (Mar. 24, 2013), <http://articles.latimes.com/2013/mar/24/opinion/la-oe-klarman-scotus-and-gay-marriage-20130324> ("[W]hile a broad marriage equality ruling would undoubtedly generate some backlash, its scope would be far less than that ignited by *Brown* or *Roe*").

100 Klarman seems to use this point to argue that *Obergefell* will manage to avoid resistance in the Deep South, despite pockets of less-than-favorable public opinion, presumably by guaranteeing that defiant actions on the part of local leaders will be largely unsupported by the broader party, and thus too politically costly in the long-term to pursue. See Shenkman, *supra* note 99.

101 *Id.*

102 Though Klarman's preceding set of factors seems to present several independent sources of backlash, I argue that they cannot be separated from one another so neatly. Contrary to what such lists of discrete factors imply, it simply is not possible to sever any of these factors from Klarman's first factor, as a decision's congruence with public opinion is the driving force underlying the potential backlash it will face. The remaining factors are simply more nuanced, highly specific approaches to the first. See *infra* Part III.

103 See generally Eskridge, *supra* note 21, at 309–23 (listing several positive effects of the same-sex marriage litigation strategy for the movement, while nevertheless cautioning courts to proceed incrementally).

104 *Id.* at 292–94.

Like Klarman's most recent framework, Eskridge's concept of backlash attributes resistance, at a base level, to a decision's incompatibility with public opinion, though Eskridge puts more emphasis on the strength of opinions across the population than previously explored approaches. Whereas the stakes are low and the potential for backlash is absent in normal politics, the higher the political stakes surrounding a policy issue (moving from identity politics to the politics of disgust) the more intense and harmful to the policy the potential backlash will be, regardless of the institution taking action on the issue.¹⁰⁵ Courts are the most likely institution to inspire backlash simply because of their propensity to issue holdings that settle a matter for one side and against another, rather than reaching the type of political compromise usually sought by legislators.¹⁰⁶ Such final decisions, especially with regard to newly emerging, divisive political groups, heighten political stakes, inspiring politics of disgust by making the losing side feel alienated from politics.¹⁰⁷ Thus, while Eskridge applauds the marriage-equality litigation movement's progress, he cautions against litigation decisions that declare a clear winner, instead calling for a more incremental jurisprudence that lowers the stakes of politics to avoid harmful backlash.¹⁰⁸

III. *OBERGEFELL'S* BACKLASH

Those who are anxious about backlash have little to fear from the Court's holding in *Obergefell v. Hodges*. Though it was an historic ruling that is already being characterized as the *Brown v. Board of Education* of the marriage-equality movement,¹⁰⁹ the backlash literature indicates that, unlike *Brown*, *Obergefell* will not face massive resistance. This Part will draw from common themes throughout the previously

105 *Id.* at 279. Eskridge's attempt to distinguish more harmful forms of backlash from less harmful forms (i.e. those associated with "the politics of disgust" and "identity politics," respectively) seems to be, at least in part, directed toward circumventing Post and Siegel's critique of Eskridge's former work as being too juricentric, and thus discounting backlash's capacity to facilitate productive constitutional dialogue. See Post & Siegel, *supra* note 78, at 396–401. Whether he accurately assesses the propensity of backlash to be so harmful that it undermines constitutional dialogue is a compelling question, and one that merits further exploration elsewhere.

106 Eskridge, *supra* note 21, at 279 ("Although judicially recognized equality is not always more divisive than legislatively recognized equality, there is a particular danger that judges will move too fast in response to legitimate demands by the despised minority.").

107 *Id.* at 292–96.

108 *Id.* at 321–22.

109 Corydon Ireland, Christina Pazzanese & Alvin Powell, *One for the Ages*, HARV. GAZETTE (June 26, 2015), <http://news.harvard.edu/gazette/story/2015/06/one-for-the-ages/>.

examined backlash scholarship to explain why a large-scale backlash is unlikely. As the previous Part revealed, two common strands of reasoning used to explain backlash wind throughout the literature: the public opinion strand and the democratic legitimacy strand. This Part will briefly explore each strand, concluding with an analysis of how they affect the predicted backlash post-*Obergefell*.

A. *The Public Opinion Strand*

The first theme throughout the literature, which I refer to as “the public opinion strand,” attributes backlash to the judicial tendency, due to greater insulation from political accountability than the other branches, to make decisions that stretch too far afield of public opinion, thereby inspiring popular resistance. Though this strand is the most salient and nuanced in the backlash theories of Klarman and Eskridge, it is prevalent throughout all of the literature. At the risk of being overly reductive, this factor does most of the analytical legwork in each of the backlash theories previously discussed.

To illustrate, though Klarman’s latest set of backlash factors seems to present several independent sources of potential backlash, each factor is inseparable from, and in fact functions through, his first factor—public opinion.¹¹⁰ For example, Klarman’s treatment of his second factor, “direct impact on the lives of opponents,” has more to do with the strength of public opinion on the policy-opposing side than actual policy impact. While there is no doubt, as Klarman argues, that *Brown* had a direct, tangible effect on many Southern whites by attempting to desegregate schools that their children attended,¹¹¹ it is much harder to make the same claim for *Roe*. Yet Klarman claims that *Roe* directly affected opponents because they “regard [abortion] as murder.”¹¹² This sounds like an appraisal of the strength of opinion among the opposition, rather than a tangible direct effect on them. To put it another way, nobody is forcing proliferators or their relatives to obtain or endorse abortions. Thus, *Roe* had no *direct* effects on abortion opponents in the sense that *Brown* directly affected the lives of segregationists with school-aged children. Ra-

110 See *supra* notes 99–102 and accompanying text. Most recently, Klarman argued that *Obergefell* will largely dodge backlash for four reasons: (1) it is congruent with public opinion toward marriage equality, (2) it does not directly impact the lives of opponents, (3) the national Republican party has grown less likely to endorse isolated resistance to same-sex marriage, and (4) circumventing implementation will be difficult. Shenkman, *supra* note 99.

111 Shenkman, *supra* note 99.

112 *Id.*

ther, *Roe* had a perceived effect on opponents because of the strength of their conviction that “abortion is murder.” In the same vein, *Brown* could also be explained by reference to the perceived effect rather than (or, in addition to) the direct one. Thus, one might more simply describe the “direct effect” factor as a more nuanced look at a single aspect of public opinion.¹¹³

Likewise, Klarman’s third factor, in this case the national Republican Party’s decreased likelihood to endorse isolated resistance to same-sex marriage, has a fairly clear relationship with national public opinion. Where the national party establishment recognizes a losing battle in the public opinion realm, it will be reluctant to pour resources into isolated political clashes against the nationally favored policy, even where the policy is highly disfavored on the local level.¹¹⁴ Thus, the party establishment support factor can also be described as a more specific public opinion inquiry.

Finally, contrary to what Klarman’s fourth factor implies, the capacity to circumvent implementation,¹¹⁵ like his other factors, is simply a function of whether and to what degree the decision contravenes public opinion. Specifically, those in positions of power will only refuse to implement decisions where there is sufficient popular support for doing so. This is true for both technical and direct non-compliance, though the relative political costs of each may call for a higher degree of policy-opposing public opinion for a politician to choose the latter. Nevertheless, it is hard to conceive of any public policy where difficulty associated with resisting implementation would foreclose popularly supported resistance to such implementation without envisioning a radically different government structure than what the United States currently has. Therefore, like the “direct effect” element, Klarman’s implementation factor, though nuanced, can be simplified as a derivative of the backlash predictor that really does the analytical heavy lifting: public opinion.

B. The Democratic Legitimacy Strand

The second theme, which I refer to as “the democratic legitimacy strand,” explains judicial backlash as a product of a supposedly popular perception of courts as lacking democratic legitimacy (and therefore also the authority to issue far-reaching policies that ought to

113 Klarman has acknowledged the role of strength of public opinion elsewhere. See KLARMAN, *supra* note 88, at 172–74.

114 See Shenkman, *supra* note 99; see also *supra* note 100 and accompanying text.

115 Shenkman, *supra* note 99.

have been deliberated on by politically accountable legislators). This view is present primarily in Rosenberg's work,¹¹⁶ though it also lingers in the background of Klarman's older backlash theory,¹¹⁷ and it remains a favorite theme of dissenting justices.¹¹⁸

Standing in stark contrast to the public opinion strand within the literature, the democratic legitimacy strand has been largely abandoned by the most recent treatments of backlash, and for good reason. The idea that controversial political decisions should be enacted through popular will, rather than at the whim of appointed judges, has intuitive appeal. Yet this outlook is at odds with a substantial body of literature arguing that people actually prefer courts to decide major constitutional issues over other governmental bodies.¹¹⁹

Moreover, though the concept of a democratic institutional preference is enticing to American sensibilities, common sense endorses the simpler conclusion that people care less about the source of a governmental decision than its substance.¹²⁰ A recent empirical examination bolsters this premise, finding that people will disapprove of decisions they disagree with from a policy perspective and agree with those that match their personal views, regardless of whether the decision comes from the judiciary or the legislature.¹²¹ Put another way, just as "judicial activism flouts the popular will" offers an attractive narrative, so too does "legislature gets it wrong due to partisan stalemate." The narrative one endorses will be driven not by beliefs regarding the institution, but rather by personal views on the decision which that institution reached.¹²² This is true for people on both sides of the aisle.¹²³ Thus, while "judicial activism" provides an attractive rhetorical attack on court decisions that one finds adverse, there is no evidence to suggest that it achieves any real backlash effect on its own.¹²⁴ Cries of "judicial activism" are a symptom, rather than a cause, of backlash. The people who subscribe to the "judicial activ-

116 See *supra* notes 85–86 and accompanying text.

117 See *supra* note 91 and accompanying text.

118 See, e.g., *supra* note 9 and accompanying text (collecting portions of *Obergefell* dissents that echo the democratic legitimacy theme).

119 See Fontana & Braman, *supra* note 91, at 739–40 (listing literature in support of pro-Court institutional preference).

120 See Post & Siegel, *supra* note 78, at n.91 (opining that "the common sense of the matter is surely to the contrary" regarding the democratic legitimacy backlash rationale).

121 Fontana & Braman, *supra* note 91, at 758–61 (explaining that experimental results show that "beliefs about the competence of the institutions themselves are contingent, in significant part, on whether the institution delivers an outcome that a subject favors").

122 *Id.* at 758.

123 *Id.* at 760.

124 *Id.* at 741, 766, 789.

ism” argument do so because they already disagree with the opinion’s substance, not because of strong preexisting attitudes toward the judicial institution.

Applying this insight to *Obergefell*, despite the grave warnings of the dissenting justices, the Court’s decision to “[steal] this issue from the people” will not “cast a cloud over same-sex marriage” that is any different from the cloud that would have been cast had the legislature made the same decision.¹²⁵ The institution making the decision does not create the storm cloud; the substance of the decision does. The institution simply affects the cloud’s location, whether that be over the Supreme Court, the Capitol Building, or the White House. For same-sex marriage opponents, the “dramatic social change”¹²⁶ arising from this policy would have been difficult to accept, regardless of its source.

C. *Public Opinion and Obergefell*

The democratic legitimacy strand’s fall from favor does not mean that courts do not offer a unique source of backlash. As the first strand from the literature provides, judicial backlash does not arise from public opinion rejecting the court, but rather from the court rejecting public opinion. To be clear, courts do not typically reject public opinion intentionally; however, because judges tend to be the least politically accountable officeholders, they have the lowest incentive to stay up to speed.¹²⁷ Even more importantly, institutional orientation and demographic skewing make judges highly likely to hold views that differ from those of the general population.¹²⁸

Does it follow that the judiciary is always doomed to incur backlash when it rules on issues about which there are strong public opinions?¹²⁹ Clearly not. Where a court makes an effort to stay sensitive to

¹²⁵ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting).

¹²⁶ *Id.*

¹²⁷ KLARMAN, *supra* note 20, at 169–70. Klarman notes that this holds true not only for appointed judges, but also for elected judges (though to a lesser extent), because they “stand for reelection less frequently than do legislators.” *Id.* at 169.

¹²⁸ *Id.* at 170 (noting that judges are members of the educational, socioeconomic, and legal elite, predisposing them to have more liberal views, especially “on issues such as gender equality and gay equality”); *id.* at 171 (“Judges may advance beyond public opinion on issues such as gay marriage . . . [in part] because they function within an institution that operates according to different norms than the political system does.”).

¹²⁹ The question is posed in this manner to acknowledge that the vast majority of court decisions (even from the Supreme Court) do not touch upon subjects about which the American public has taken positions, as these decisions usually have few or no effects that reach beyond resolving the adjudicated conflict (especially in the case of lower courts), and even when the rulings do have policy implications, they are often limited to specific

public attitudes, it can choose to issue decisions that will not incur significant backlash. Indeed, the Supreme Court rarely departs far from public opinion,¹³⁰ though where it has, the most memorable cases of backlash in American history have followed.¹³¹ Thus, the Supreme Court has good reason to tread lightly when dealing with sensitive public opinion issues.

This is probably why its handling of *Obergefell* has been so careful. With *Roe v. Wade* in the rear-view mirror,¹³² the Court chose to pursue “a jurisprudence of minimalist incrementalism,”¹³³ issuing decisions that advanced the cause of marriage equality steadily, without getting too far ahead of public opinion.¹³⁴ Thus, when *Obergefell* was decided, approximately 60% of the American public fell in favor of same-sex marriage.¹³⁵ Moreover, the intensity of public opinion favoring same-sex marriage had grown to match and even exceed the strength of beliefs held by the opposition.¹³⁶ This level of current support, com-

contexts (e.g. court procedural rules). See, e.g., Margaret Meriwether Cordray & Richard Cordray, *Setting the Social Agenda: Deciding to Review High-Profile Cases at the Supreme Court*, 57 U. KAN. L. REV. 313, 323–24 (2009) (examining the Supreme Court’s 1983–1993 terms and concluding, using a variety of measures, that an average of only fifteen cases per term fell within the “high-profile” category).

130 See KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 93, at 449 (“The justices reflect dominant public opinion too much for them to protect truly oppressed groups.”).

131 See generally Post & Siegel, *supra* note 78 (discussing various backlash approaches used to explain popular resistance to *Roe* and *Brown*).

132 See, e.g., Jonathan Bullington, *Justice Ginsburg: Roe v. Wade Not ‘Woman-Centered’*, CHI. TRIB. (May 11, 2013), http://articles.chicagotribune.com/2013-05-11/news/chi-justice-ginsburg-roe-v-wade-not-womancentered-20130511_1_roe-v-abortion-related-cases-wade-case (reporting on Justice Ginsburg’s worries that the Supreme Court moved too fast with *Roe*, inciting major backlash); see also Greg Stohr & Matthew Winkler, *Ruth Bader Ginsburg Thinks Americans Are Ready for Gay Marriage*, BLOOMBERG NEWS (Feb. 12, 2015), <http://www.bloomberg.com/news/articles/2015-02-12/ginsburg-says-u-s-ready-to-accept-ruling-approving-gay-marriage-i61z6gq2> (describing Justice Ginsburg’s opinion, before the *Obergefell* ruling, that it “would not take a large adjustment’ for Americans should the justices say that gay marriage is a constitutional right”).

133 Nan D. Hunter, *A Deer in the Headlights: The Supreme Court, LGBT Rights, and Equal Protection*, 52 HOUS. L. REV. 1121, 1131 (2015).

134 See *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (refusing to rule on same-sex marriage but leaving it legal in California); *United States v. Windsor*, 133 S. Ct. 2675 (2013) (declaring DOMA unconstitutional); *Lawrence v. Texas*, 539 U.S. 558 (2003) (declaring sodomy laws unconstitutional).

135 See McCarthy, *supra* note 14 (demonstrating that public opinion in support of gay marriage remained stable after *Obergefell*, thus implying that the decision did not outpace public opinion on the issue).

136 See Gary Langer, *Support for Gay Marriage Reaches Record High*, ABC NEWS (Apr. 23, 2015, 7:18 AM), <http://abcnews.go.com/Politics/support-gay-marriage-reaches-record-high/story?id=30507803> (“[S]trong support for allowing gay marriage exceeds strong opposition by 15 percentage points In a similar question in 2004, by contrast, strong opposition exceeded strong support by 34 points.”).

bined with the continual positive trend in public attitude toward marriage equality, means that *Obergefell* will incite little or no backlash.

While this is a simple conclusion, it fulfills the many nuanced factors employed in the literature. Excluding predictors based in notions of democratic legitimacy backlash, under Rosenberg's rudimentary backlash analysis,¹³⁷ the Supreme Court has avoided massive backlash by keeping its decisions in line with public opinion. Likewise, under Klarman's former analysis,¹³⁸ backlash will be avoided because (1) the decision is congruent with public opinion, (2) salience is already high on the issue, and (3) the Court, by proceeding incrementally, has avoided drastically changing the order of social reform. Using Klarman's more recent analysis,¹³⁹ favorable public opinion ensures that avoiding implementation, no matter how easy this might be, will not be politically expedient, especially because the public opinion trend essentially guarantees that resisters will not get party support on the national level. Without party support of resistance, which arises from public opinion endorsing such resistance, significant backlash will not even occur in geographically isolated locations with majority opposition to marriage equality. Finally, under Eskridge's framework,¹⁴⁰ by pursuing incremental progress toward marriage equality rather than declaring a winner when the issue first appeared in front of the Justices in 2013, the Supreme Court allowed the positive growth in public views on same-sex marriage to continue. The Supreme Court not only lowered the stakes with its *Windsor* ruling, but also signaled to lower courts how to proceed on the question, allowing the issue to advance at its own pace, district by district and state by state, diffusing any would-be backlash.

IV. IMPLICATIONS

The foregoing analysis poses two important questions with regard to the efficacy of pursuing social change through litigation. First, if the Supreme Court must track public opinion to avoid backlash, doesn't that interfere with its duty to vindicate constitutional rights? The short answer to this question is: not necessarily. The legacy of same-sex marriage litigation, especially between *Windsor* and *Obergefell*, illustrates how the judiciary can aggressively pursue a policy agenda without clashing with public opinion at the Supreme Court

¹³⁷ See *supra* note 81 and accompanying text.

¹³⁸ See *supra* note 89 and accompanying text.

¹³⁹ See *supra* notes 100–101 and accompanying text.

¹⁴⁰ See *supra* notes 103–104 and accompanying text.

level. Though *Windsor* advanced the marriage-equality cause directly by invalidating DOMA, it also facilitated progress indirectly by signaling the Supreme Court's policy preferences to lower courts, triggering a cascade of favorable precedent that significantly advanced the cause by the time *Obergefell* emerged two years later.¹⁴¹ Thus, to use Klarman's words, in *Obergefell* the Supreme Court once again "constitutionalized consensus and suppressed outliers."¹⁴² This time, however, it was the judiciary that helped create the consensus in the first place, with lower courts legalizing marriage in twenty-two states between *Windsor* and *Obergefell*.¹⁴³

This highlights the potentially important role of state and district courts in facilitating social movement progress. Though *Baehr* led to a massive backlash that, at the time, seemed to hurt more than help the same-sex marriage cause, it also moved a previously radical idea into the realm of possibility, influencing the movement's entire agenda and setting into motion a sequence of events that would parallel steadily increasing positive attitudes toward same-sex marriage.¹⁴⁴ "Put simply, there is little reason to believe people would have been talking about, thinking about, or warming up to same-sex marriage this much or this quickly had the court decisions not so dramatically put the issue on the public radar screen and begun a public dialogue."¹⁴⁵

Cases like *Baehr* and *Goodridge*, along with the many lower court cases between *Windsor* and *Obergefell*, also give credence to the idea that not all backlash is bad backlash. Previous literature has recognized the utility of backlash for facilitating constitutional dialogue,¹⁴⁶ yet this dialogue can also be beneficial from a juricentric perspective. In other words, backlash can not only benefit constitutional legitimacy generally by involving the public in a constitutional dialogue, it can also benefit the specific aims of a litigation campaign. For instance, where backlash raises the salience of a previously unfamiliar issue, causing the public to form opinions, it can contribute to the long-term progress of a social movement.¹⁴⁷ Because of courts' rights-protection orientation, they will often represent an emerging group's best chance at governmental and public recognition, in a sense forc-

141 See Watts, *supra* note 68, at S74–S77.

142 See *supra* note 93 and accompanying text.

143 See *supra* note 74 and accompanying text.

144 Eskridge, *supra* note 21, at 310–11; see also *supra* notes 22–24 and accompanying text.

145 Schacter, *supra* note 41, at 1220.

146 Post & Siegel, *supra* note 78, at 398.

147 Eskridge, *supra* note 21, at 311.

ing governmental institutions and the public in general to acknowledge, rather than ignore, the emerging group, even when the group starts out on the fringes of society.

The discussion from Part III poses an additional question: if the Supreme Court is bound by public opinion, will it ever be more effective than legislatures at creating social change? The answer to this is an unequivocal yes. The scope of action defined by public opinion acts as a restraint on all political branches: get too far behind public opinion and risk irrelevancy, but get too far ahead and face the specter of backlash. Not all branches are equally constrained within this zone of action, however. Though the branches will often mirror each other, an adept Supreme Court can act more quickly than a legislature within this public opinion window.

Even where public opinion favoring a policy exists at a sufficient level to render backlash unlikely, national politics and legislator concerns about outlying constituencies can operate to slow the legislative process.¹⁴⁸ The Supreme Court does not share these constraints. Though political leaders of outlier districts have little motivation to work toward an unpopular policy in the legislature, neither do they have a sufficient political incentive to fight a court ruling imposing the policy when they will be unsupported on the national level. It is much easier to reluctantly accede to the Supreme Court's ruling, as many state leaders did in the wake of *Obergefell*, than to independently fight a losing political battle.¹⁴⁹ Thus, the same weakness of the Court that arises from its lack of direct political accountability can serve as the strength of a more aware Court that keeps its finger on the pulse of public opinion.

148 This is by no means an exhaustive list of potential legislative hindrances. See, e.g., Steven Hill & Robert Richie, *Why America Can't Pass Gun Control*, THE ATLANTIC (Dec. 20, 2012), <http://www.theatlantic.com/politics/archive/2012/12/why-america-cant-pass-gun-control/266417/> (asserting that gun control measures do not gain traction in Congress largely because of the influence the NRA holds with a small number of constituents located in swing congressional districts); Sarah Binder, *How Political Polarization Creates Stalemate and Undermines Lawmaking*, WASH. POST: MONKEY CAGE (Jan. 13, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/13/how-political-polarization-creates-stalemate-and-undermines-lawmaking/> (emphasizing the role of political polarization in creating deadlock within Congress); Aaron Belkin, *Filibuster Reform Will Result in a More Responsive Congress*, N.Y. TIMES (Nov. 22, 2013), <http://www.nytimes.com/roomfordebate/2013/11/22/a-change-in-rules-on-filibusters-and-its-impact-on-congress/filibuster-reform-will-result-in-a-more-responsive-congress> (describing how the partisan use of "the filibuster has allowed minority factions to block policies that public majorities support" and how "filibusters have frozen federal policies").

149 See *supra* notes 11–12 and accompanying text.

Despite possessing the potential to act as a catalyst for social change, the Supreme Court takes a substantial risk whenever it does so. If it misjudges public opinion, it may take an action that attracts serious backlash. However, by acting too slowly, the Court may allow ongoing constitutional violations, assuming the Court sees the issue as such. These violations will often be a necessary cost of moving at a speed that does not incur backlash, allowing the Court to take care and perhaps pursue a minimalist jurisprudence that allows lower courts to take the lead role in forging forward and cultivating public support, as was done here. While the actions of the lower courts serve to mitigate such constitutional violations, the Supreme Court nevertheless has an incentive to decide the case as soon as the prudent desire to avoid backlash allows, vindicating the constitutional rights of all citizens—even those in places where lower courts refuse to push the ball forward. Thus, where the Supreme Court wishes to usher in social change, it has the difficult job of balancing between the political reality of backlash and the judicial duty to vindicate constitutional rights. For *Obergefell*, time will show not only that the Court acted within this public opinion window, but also that it influenced the size of the window by indirectly pushing its policy aims through lower courts, allowing them to lead the charge and diffuse future backlash.

CONCLUSION

The *Obergefell* legacy has much to teach backlash scholars, social movement advocates, and the judiciary. For scholars, *Obergefell* cautions against categorical pronouncements regarding causes and effects of backlash. The analysis of backlash presented here seeks to both focus the backlash causal inquiry and direct future scholarship toward searching out the many nuanced contextual factors that influence public opinion in any given case.

Obergefell also poses to scholars the wider question of the degree to which the actions of courts and litigators in the same-sex marriage campaign can be useful in other contexts. Admittedly, the foregoing analysis glosses over many of the somewhat unique social and political trends underlying the movement toward marriage equality.¹⁵⁰ Though I contend that the developments that this analysis points out, especially with regards to Supreme Court jurisprudential strategy, can

¹⁵⁰ See KLARMAN, *supra* note 20 (providing a nuanced, holistic treatment of the marriage-equality movement that examines many of these trends).

be carried over to other contexts, I leave open the question of the conditions required—for example, the degree to which lower courts must be sympathetic to the Supreme Court’s agenda—to facilitate the use of such a strategy across circumstances.

For advocates, the *Obergefell* story suggests that, far from being a “hollow hope,” the pursuit of a litigation campaign can bolster the status of a social movement, both through favorable rulings and through extrajudicial effects, for example raising the salience of previously unexamined issues. Though litigation runs the risk of causing resistance, the backlash it inspires will not necessarily be detrimental in the long term; litigation can still serve as the backbone of a highly effective social movement as it did in the fight for marriage equality.

Finally, *Obergefell* shows that the judicial branch can act as a potent facilitator of social change. Though the Supreme Court is constrained by public opinion, it is less constrained than the other branches; moreover, it has the limited ability to circumvent this constraint by signaling its policy preferences to lower courts. *Obergefell*’s largely peaceful aftermath will underscore these lessons, restoring the hope of those who put faith in the judiciary’s ability to effectively advance the protection of constitutional rights, even where social change is necessary to do so.